SOUTHWEST SUBURBAN CABLE COMMISSION
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August 21, 2018

VIA ECFS

Marlene H. Dortch, Esq
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: NCTA June 11, 2018 Letter in Wireline Infrastructure, WC Docket No. 17-84

Dear Ms. Dortch:

The Southwest Suburban Cable Commission ("SWSCC") urges the Commission not to grant the twelve separate requests made by NCTA in its June 11, 2018 letter (the "NCTA Letter").[1] If acted upon, NCTA's requests would have broad and far-reaching effect, diminishing powers granted to local governments under federal law and enriching private enterprises at the expense of citizens. The Commission should not act on NCTA's requests.

SWSCC consists of the following Minnesota cities: Eden Prairie, Edina, Hopkins, Minnetonka and Richfield ("Member Cities"). The SWSCC was established pursuant to Minnesota law for the purposes of coordinating administration and enforcement of each Member Cities' cable franchise to insure that cable systems are constructed, operated, maintained and upgraded in a manner that will maximize benefits to all cable subscribers and each Member City. Collectively, the Member Cities have 221,687 residents and are vital parts of the economic and cultural wellbeing of the State of Minnesota.

NCTA asserts its proposals are necessary to "reduce or eliminate obstacles to broadband deployment."[2] No such obstacles exist in the Member Cities. For example, in early 2016, the SWSCC granted a competitive cable franchise to CenturyLink to allow for greater deployment of facilities and infrastructure to provide communications services in the Member Cities. Both the incumbent cable operator's (Comcast) franchise and the CenturyLink franchise contain language that allow the operators to provide non-cable services, including broadband services, without the need to seek additional authorization:

> *Nothing in this Franchise shall be construed to prohibit Grantee from: (1) providing services other than Cable Services to the extent not prohibited by Applicable Law; or (2) challenging any exercise of the City's legislative or regulatory authority in an appropriate forum. The City hereby reserves all*

[1] The requests made by NCTA are shown on Exhibit A.
[2] NCTA Letter, p. 1.

> *of its rights to regulate such other services to the extent not prohibited by Applicable Law and no provision herein shall be construed to limit or give up any right to regulate.*[3]

In addition to supported CenturyLink's fiber deployment, the Member Cities have allowed Comcast to install Wi-Fi facilities in the public rights-of-way with no additional permitting or fees and are working cooperatively with wireless providers as they continue to seek greater access to the public rights-of-way to deploy wireless facilities and back haul connectivity. NCTA's own statements call into question whether obstacles to broadband deployment exist anywhere, as "The cable industry is a leader in the deployment of broadband infrastructure in the United States"[4] and has invested over $275 billion to deploy broadband networks.[5]

The disconnect between NCTA's claims and what is actually occurring highlights the concern that NCTA is encouraging the Commission to implement radical changes without the benefit of a full and complete record or an accurate description of the current law. If the Commission has interest in the matters raised by NCTA, it should initiate a full and thorough examination, not rely on vague, unsupported assertions. If such an examination occurs, it will become apparent that NCTA's requests are not justified.

I. LOCAL RIGHTS-OF-WAY REGULATION IS LEGITIMATE AND APPROPRIATE.

The Member Cities and other local governments have a legitimate and congressionally-recognized interest in regulating public rights-of-way.[6] NCTA improperly seeks to restrict these regulatory powers to "generally applicable permit provisions addressing time, place and manner of access for construction that will disrupt use of the right-of-way."[7] This would dramatically change local regulation of the public rights-of-way. For example, a local government may not be able to require undergrounding if undergrounding is not related to the time, place and manner of access for construction.

NCTA's request is even more troubling when combined with its assertions that cable operators should be granted the right to use their cable franchises as a means of providing non-cable services.[8] NCTA contends that a cable franchise is carte blanche to access and use the public rights-of-way for any purpose.[9] Yet, as noted above, at least CenturyLink and Comcast have acknowledged in franchises with the Member Cities that the provision of non-cable services is subject to regulation. If the NCTA position was true, and when combined with NCTA's request to gut local authority,

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[3] Section 2.1 of both the Comcast Franchise and the CenturyLink Franchise.
[4] NCTA Letter, p. 1.
[5] https://www.ncta.com/broadband-by-the-numbers.
[6] 47 U.S.C. §§ 253(d), 542(b), 556(a).
[7] NCTA Letter, p. 9 ("a franchise granting authority to build a 'cable system' … includes authority to install and operate … communications equipment to provide additional non-cable services without obtaining a separate franchise or authorization or paying additional fees.").
[8] NCTA Letter, p. 2-3.
[9] NCTA Letter, p. 6.

there would be nothing to stop a cable operator from lining residential streets with 150 foot monopoles, square utility boxes and backup generators. This is clearly not supported in federal law.

II. COMPENSATION FOR THE USE OF VALUABLE PUBLIC PROPERTY AND PAYMENT OF THE COST OF REGULATION ARE BOTH LEGITIMATE AND APPROPRIATE.

Public rights-of-way belong to the citizens, not NCTA and its members.[10] The Member Cities have an obligation to not "abdicate [their] trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties…."[11] Fulfilling that obligation necessitates obtaining fair and reasonable compensation for the use and management of public rights-of-way.

Federally-authorized cable franchise fees are fair and reasonable compensation for the use of public rights-of-way *for the operation of a cable system to provide cable services*.[12] Congress has made no such determination that the payment of the cable franchise fee is fair and reasonable compensation for other uses of the public rights-of-way. Ultimately, NCTA asks that its members receive free access to the public rights-of-way for uses beyond cable service. Given the extraordinary requests made by NCTA, it is clear that the public rights-of-way have extraordinary value to cable operators and others. It is inappropriate for that value to be taken from the citizens and transferred to private businesses.

The Member Cities' have the responsibility to manage the public rights-of-way *and* to recover the costs associated with management activities.[13] The Member Cities recover these costs "by imposing a fee for registration, a fee for each right-of-way or small wireless facility permit, or, when appropriate, a fee applicable to a particular telecommunications right-of-way user when that user causes the local government unit to incur costs as a result of actions or inactions of that user."[14] Management costs are increasing due to the numerous demands being placed on the public rights-of-way to facilitate broadband deployment. Further, regulatory responsibility extends beyond approvals to ongoing monitoring and evaluation that prevents conflicts and protects the public's use of the rights-of-way. These are all legitimate costs that should not be borne by the citizens.

III. AN ACCURATE RECORD IS NEEDED.

The NCTA Letter does not present an accurate record upon which the Commission could act. For example, NCTA discusses the actions of some local governments, though without any specificity as to the exact jurisdictions in question. Even if NCTA is accurately describing the actions of these unidentified local governments, a handful of examples do not justify sweeping nationwide changes.

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[10] *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).
[11] *Id.* at 453.
[12] 47 U.S.C. § 542(b).
[13] Minn. Stat. § 237.163, subd. 2 (b) ("Subject to this section, a local government unit has the authority to manage its public rights-of-way and to recover its rights-of-way management costs.").
[14] Minn. Stat. § 237.163, subd. 6.

This is especially true when NCTA acknowledges that "*many* local governments are supportive of the cable industry's deployment of new facilities and new services…."[15] If the Commission is to take up NCTA's request, it should do so with the benefit of a full, complete and accurate record of existing regulatory policies – both successes and areas that are in need of improvement.

The Commission's existing dockets do not provide the evidentiary basis for action. A truly accurate record would account for the differences in the cable and telecommunications regulatory constructs codified in federal, state and local laws. It would also reflect the current status of the law, which is that local governments are not barred from regulating the provision of non-telecommunications services by incumbent cable providers.[16]

IV. CONCLUSION

SWSCC appreciates the opportunity to respond to NCTA's Letter, which does not justify action at this time. If the Commission is to consider NCTA's requests, SWSCC will participate in the development of a full, complete and accurate record for the Commission's assessment. Until such a record is developed, NCTA's requests should not be granted.

Very truly yours,

/s/ Patty Latham

Patty Latham
Chair
Southwest Suburban Cable Commission

cc via email: Rick Getschow, Eden Prairie City Manager
Scott Neal, Edina City Manager
Ari Lenz, Hopkins Assistant City Manager
Steve Devich, Richfield City Manager

[15] NCTA Letter, p. 1 (emphasis added).
[16] *Montgomery County, Maryland v. Federal Communications Commission*, 863 F.3d 485, 493 (6th Cir. 2017).

Exhibit A

12 Rulings Requested by NCTA

1. Clarify that local authorities may not require additional franchises, fees, conditions or authorizations beyond a Title VI cable franchise and routine, straightforward permits for the placement of the cable system (and equipment attached thereto) in the public right of way, or for the offering of new services over such facilities.
2. Confirm that authority to build a "cable system," as defined in Section 602 includes authority to install and operate, as part of the cable system, communications equipment to provide additional non-cable services without obtaining a separate franchise or authorization or paying additional fees.
3. State that local authorities may not require cable operators to obtain separate authorization beyond the cable franchise for placement of small wireless equipment on a cable system.
4. Reaffirm that the federal 5% cap on cable service franchise fees for use of the public right of way for the provision of cable and non-cable services.
5. Declare that a franchising authority a franchising authority cannot refuse to process permit requests on the ground that the equipment can be used for non-cable services, including wireless services.
6. Declare a provider may not be required to obtain additional approval or consent from the franchising authority, other than generally applicable traffic control permits, for lashing communications facilities to facilities already installed under a cable franchise.
7. Declare new facilities to be installed as part of a franchised cable system in the public right-of-way may be subject only to generally applicable permit provisions addressing time, place and manner of access for construction that will disrupt use of the right-of-way and should be processed in a timely manner.
8. Declare any fees for routine permits should be limited to the actual cost of processing and reviewing the permit.
9. Adopt a declaratory ruling that, in addition to their rights under state property law, franchised cable operators have the right under Section 621(a)(2) to utilize compatible utility easements, regardless of the services provided over the cable system.
10. Rule that owners of private easements may not engage in discriminatory behavior or restrict a franchised cable operator's rights to utilize compatible easements for such purposes.
11. Cable operators should have access to easements under the terms and conditions of existing easement agreements, without being required to negotiate a new agreement with the grantor of the easement
12. Find any costs incurred by a cable operator and not reimbursed by a franchising authority in connection with any discriminatory forced relocation of facilities are considered franchise fees for purposes of Title VI.